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CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

IN THE NEBRASKA COURT OF APPEALS

Case No. A-19-985

JONI POEHLING

Plaintiff/Appellant,

v.

PATRICK POEHLING

Defendant/Appellee.

BRIEF OF JONI POEHLING, Appellant

APPEAL FROM DISTRICT COURT OF SAUNDERS COUNTY, NEBRASKA

THE HONORABLE CHRISTINA M. MARROQUIN
District Court Judge
Trial Court No. CI17-67

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ATTORNEY FOR JONI POEHLING, Appellant

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JURISDICTIONAL STATEMENT

Neb. Rev. Stat. § 25-1912(1) (Reissue 2016) provides that "proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and, . . . by depositing with the clerk of the district court the docket fee required by section 33-103."

"The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01 . . .A new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion." Neb. Rev. Stat. § 25-1912(3) (Reissue 2016).

"[A]n appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court, and after being perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and depositing of such docket fee shall be deemed jurisdictional." Neb. Rev. Stat. § 25-1912(4) (Reissue 2016).

Appellant seeks review of the Decree for Dissolution filed on July 16, 2019, in the District Court of Saunders County, Nebraska. (T42-51).

Appellant filed a Motion for New Trial or in the Alternative Motion for Reconsideration on July 25, 2019. (T52-53). Neb. Rev. Stat. § 25-1144.01 (Reissue 2016) provides that "A motion for new trial shall be filed no later than ten days after the entry of the judgment." An Order denying the motion was filed on September 17, 2019. (T60).

Notice of Appeal was filed on behalf of Appellant, Joni M. Poehling, on October 16, 2019. The docket fee was deposited on October 16, 2019.

The order sought to be reviewed adjudicates all the claims, rights and liabilities of all the parties.

STATEMENT OF THE CASE

1. NATURE OF THE CASE.

This is an appeal from a Decree for Dissolution which determined issues of division of property and debts, and award of alimony and attorney fees.

2. THE ISSUES ACTUALLY TRIED IN THE COURT BELOW.

The issues tried included division of property and debts, award of alimony, and award of attorney fees.

3. HOW THE ISSUES WERE DECIDED AND WHAT JUDGMENT OR DECREE WAS ENTERED BY THE TRIAL COURT.

The Decree for Dissolution determined what assets were marital assets and found the marital estate to total $2,646,582.88. The trial court awarded one-third of said marital estate, $887,194.29, to Appellant, and two-thirds of said marital estate, $1,759,388.59, to Appellee.

(T49). All personal property not otherwise assigned to a party by the decree was awarded to the party currently in possession of the personal property. *Id.* Appellant's request for alimony was denied. (T50). Appellee was assigned the debt to John Deere Tractor and ordered to hold Appellant harmless from the debt. *Id.* Appellee was ordered to pay attorney fees to Jeffrey L. Stoehr relating to lake property owned by the parties in the amount of $1247.00 and ordered to hold Appellant harmless from the debt. (T50; E15). Appellant's request for attorney fees relating to the dissolution action was not addressed.

4. THE SCOPE OF REVIEW.

In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576, (2001); *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000); *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000); *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999).

In a review de novo on the record, an appellate court re-appraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Carter v. Carter, supra; Meints v. Meints, supra*.

A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Carter v. Carter*, *supra.*

Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State ex rel. Amanda M. v. Justin T.,* 279 Neb. 273, 777 N.W.2d 565 (2010).

STATEMENT OF ERRORS

1. The trial court erred in failing to divide the marital assets with each party receiving 50% thereof.

2. The trial court erred in giving Appellee consideration for lots he received from his father in dividing the marital assets one-third to Appellant and two-thirds to Appellee.

3. The trial court erred in failing to consider Appellee's purchase of gas stock from a co-mingled account in dividing the marital assets.

4. The trial court erred in failing to recognize Appellant's contributions to the marriage and the maintenance and increase of all co-mingled funds in dividing the marital assets.

5. The trial court erred in making its one-third/two-thirds division of the property by awarding income-producing property to Appellee to even up the division.

6. The trial court erred in valuing the Apartment at $170,000 rather than $175,000.

7. The trial court erred in valuing the NSEA account at $22,557.72 rather than $20,557.72.

8. The trial court erred in failing to include as a marital asset funds used to pay the premiums on a life insurance policy cashed in and retained by Appellee.

9. The trial court erred in failing to award alimony to Appellant.

10. The trial court erred in failing to award attorney fees to Appellant.

PROPOSITIONS OF LAW

I.

When dissolution of a marriage is decreed, the court may order such division of property as may be reasonable.

Neb. Rev. Stat. § 42-365 (Reissue 2016).

II.

The purpose of a property division is to distribute the marital assets equitably between the parties.

Neb. Rev. Stat. § 42-365 (Reissue 2016).

III.

When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Neb. Rev. Stat. § 42-365 (Reissue 2016).

IV.

While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately.

The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and other criteria enumerated in this section make it appropriate.

Neb. Rev. Stat. § 42-365 (Reissue 2016).

Brozek v. Brozek, 292 Neb. 681, 874 N.W.2d 17 (2016).

V.

The equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in **Neb. Rev. Stat. § 42-365.**

Westwood v. Darnell, 299 Neb. 612, 909 N.W.2d 645 (2018).

VI.

The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.

Westwood v. Darnell, 299 Neb. 612, 909 N.W.2d 645 (2018).

VII.

Under Nebraska's divorce statutes, the purpose of a property division is to distribute the marital assets equitably between the parties. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.

Bergmeier v. Bergmeier, 296 Neb. 440, 894 N.W.2d 266 (2017).

Osantowski v. Osantowski, 298 Neb. 339, 904 N.W.2d 251, (2017).

VIII.

In considering the specific statutory criteria concerning an award of alimony, a court's polestar must be fairness and reasonableness as determined by the facts of each case.

Klimek v. Klimek, 18 Neb.App. 82, 775 N.W.2d (2009).

Bauerle v. Bauerle, 293 Neb. 881, 644 N.W.2d 128 (2002).

IX.

In determining alimony, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation.

Brozek v. Brozek, 292 Neb. 681, 874 N.W.2d 17 (2016).

Klimek v. Klimek, 18 Neb.App. 82, 775 N.W.2d (2009).

Millatmal v. Millatmal, 272 Neb. 452, 723 N.W.2d 79 (2006).

X.

Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.

Klimek v. Klimek, 18 Neb.App. 82, 775 N.W.2d (2009).

Claborn v. Claborn, 267 Neb. 201, 673 N.W.2d 533 (2004).

XI.

In considering alimony, a court should weigh four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the party seeking support to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.

Brozek v. Brozek, 292 Neb. 681, 874 N.W.2d 17 (2016).

XII.

A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.

Brozek v. Brozek, 292 Neb. 681, 874 N.W.2d 17 (2016).

XIII.

The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Connolly v. Connolly, 299 Neb. 103, 907 N.W.2d 693 (2018).

Gress v. Gress, 271 Neb. 122, 710 N.W.2d 318 (2006).

Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004).

STATEMENT OF FACTS

Joni M. Poehling, Appellant, (hereinafter referred to as Joni) and Patrick J. Poehling, Appellee (hereinafter referred to as Patrick), were married on November 4, 1989. (T1). They had one minor child who aged out during the proceedings. *Id.* Joni filed a Complaint for Legal Separation on April 13, 2017. (T1-2). Patrick filed a Cross Complaint for Dissolution of Marriage on August 11, 2017. (T5-9). The parties entered into a Stipulated Order that allowed Joni to withdraw $17,000 from the parties' joint bank account to pay off her automobile loan as previously agreed by the parties. (T14). Joni paid off her vehicle and Patrick used approximately the same amount of money out of the joint account to purchase his pickup truck when the parties separated. (74:10-23).

Trial was held on May 31, 2019. (T43). Property was valued and determined to be marital or non-marital property as follows:

BY AGREEMENT OF THE PARTIES

<u>Real Estate</u>

1) Home Sale Proceeds from 9005 N. 172nd St. Bennington, NE	$350,000
2) Lot – purchased by Pat (from Home Sale Proceeds)	$ 55,000
3) Apartment on Track 7	$175,000 (less lot $25-35k)

<u>Accounts</u>

1) Ameritrade #920046716 (5/28/2019)	$253,783.06

Retirement Accounts

2) Joni's

• Ameritrade Retirement IRA #920969681	$49,068.77
• NSEA	$20,557.72

3) Patrick's

• Ameritrade SEP IRA #929778632	$141,270.21
• Ameritrade SEP IRA #920969687	$196,647.11

Vehicles/Boats/Recreational Vehicles:

1) Ford Escape (home sale proceeds)	$17,000
2) 2011 Dodge Ram Pickup (home sale proceeds)	$17,000
3) RV (home sale proceeds)	$60,000
4) Airboat	$8,500

NON-MARITAL ESTATE TO BE AWARDED TO PATRICK

1) River Island and River Bank adjacent to Woodcliff
2) Community Center in Woodcliff subdivision and proceeds therefrom
3) Gas Stock

(T43-44)

DISPUTED PROPERTY

The parties disputed whether the following property was marital or non-marital:

1) Ameritrade Account #920048474	$733,382.84
2) Home (Funds used from Ameritrade Account)	$360,000
3) Apartment Lot (Tract 7)	$25,000 or $35,000
4) Sales Proceeds (Land Sold to Goebel)	$212,373.17
5) Razor	$10,000

(T44).

The trial court found that Patrick did not meet his burden of proof to identify the Ameritrade Account #920048474 or the $360,000 from the Ameritrade Account used to purchase Patrick's home as marital property and included those amounts in the final property division as marital assets (T45-46).

Patrick valued the Apartment at $175,000. (192:16-20). Joni testified that she believed Patrick should receive credit of $25,000 as his non-marital interest in the property awarded to him based upon the price of comparable lots in the area when the lot was given to him. (51:8-23). Her opinion of the marital value of this asset was $200,000 less $25,000 or $175,000. (51:24-25; 193:21-194:1). Although testified to by both parties that Apartment on Track 7 was valued at $175,000 and was marital property, the trial court valued the apartment Lot (Track 7) at $200,000 and gave Patrick credit of $30,000 as credit against the value for a lot received from his father, including said asset at $170,000 in the marital division. (T43, 47).

The trial court determined that the Sales Proceeds (Land Sold to Goebel) were marital property. (T47-48).

The Razor utility vehicle was determined to be a gift to Joni and was awarded to her as her separate property free and clear of any interest by Patrick. (T48).

The trial court then awarded the marital property 1/3 to Joni and 2/3 to Patrick as follows:

Joni:

Home	$350,000
Ameritrade Retirement IRA	$49,068.77
NSEA	$22,557.72
Ford Escape	$17,000
½ Goebel Land	$106,186.59
Ameritrade Account #920046716	$253,783.06

12% of Ameritrade Account #920048474	$88,598.15
TOTAL	$887,194.29

Patrick:

Lot	$55,000
Apartment	$170,000
Ameritrade – SEP IRA	$141,270.21
Ameritrade – SEP IRA	$196,647.11
2011 Dodge Ram Pickup	$17,000
RV	$60,000
Airboat	$8,500
Home (Funds)	$360,000
½ Goebel Land	$106,186.58
88% of Ameritrade Account #920048474	$644,784.69
TOTAL	$1,759,388.59

(T49).

Joni was able to access the Ameritrade Account #920048474 and put money into the account or take it out although she did not recall personally transferring any money into the Ameritrade account. (47:23-48:20; 52:8-17; 145:2-6). Patrick would put his real estate commissions among other money into that account. (52:18-53:1; 174:10-175:12; E31). Joni testified that Pat made much more money from selling real estate than the value of the gifts from his father. (41:23-42:10). Joni's statement was not contested by Patrick. Patrick used this account to purchase gas stock for approximately $650,000 during the marriage testifying that the money used was received from his family; the stock had drastically reduced in value at the time of trial. (147:5-10).

During the marriage, Joni received $10,000 from her grandmother and $30,000 from her parents. (53:17-54:1). These gifts were comingled with other marital property and used for family purposes. (54:2-12).

The parties paid at least $44,000 from marital funds for life insurance premiums on a life insurance policy on the life of Patrick's father and his wife for which Patrick and his brother were beneficiaries. (78:10-79:1; 162:9-16). Patrick cashed in the policy and received $73,193.82. (79:1-2; 162:4-8). Joni requested reimbursement for $22,000 as her half of the marital money used to pay for the life insurance policy. (79:3-13; E40). This was not addressed in the trial court's decision.

The trial court made a finding that the parties had agreed that Joni's NSEA account had a value of $20,557.72. (T43; E26). The trial court included the NSEA account in making the final award at a value of $22,557.72. (T49). Patrick's counsel conceded that $22,557.72 was an error and $20,557.72 is the correct amount. (195:16-22).

Patrick proposed that the marital estate be divided 50/50, but wanted the disputed property set off to him. (225:9-16). If the disputed property was not set off to him, he proposed a 1/3-2/3 split due to lots he received from his father. (226:20-227:18). Patrick acknowledged that money from the lots received from his father had gone into various family projects including college, houses, retirement, vacations, etc. (227:1-12). He provided no documentation to show that any money received from lots went into a separate account. (230:5-8).

Patrick testified that received an inheritance from his father of $200,000.00 and one half interest in the Community Center. (173:25-174:1-19).

The trial court denied Joni's request for alimony finding "In the instant case, the circumstances of the parties do not warrant an award of alimony. Joni has a $350,000 home that is paid for. She has a vehicle and no debts. Joni is gainfully employed with Fremont [sic]

Public Schools. She has insurance and retirement through her employer. The evidence establishes that she is capable of sustaining herself through her own employment. The parties no longer have minor children to consider regarding employment obligations. Patrick works for Midwest Floor Covering. For the last several years, the parties are making comparable incomes. Plaintiff's request for alimony is denied." (T50).

Joni was 55 years old at the time of trial. (31:5-6). She had been married to Patrick for 29 years. (32:23-24). They separated on or about June 10, 2016. (32:25-33:2). She graduated high school and had about three years of college. (103:25-104:6). She worked as a legal secretary for about six or seven years until the birth of her oldest child. (104:7-14). That was her job at the time she married Patrick. (104:15-16). At the time of trial, she worked as a senior office associate at Fremont Middle School where she earned $16.03 per hour, 40 hours per week year-round. (31:7-16). She earned $33,478 in 2018. (118:9-11; E43). She had worked there full-time for two years. (31:17-19). Her current position was the first full-time job she had since working as a legal secretary. (106:10-16). She testified that she expects that she can continue to work in her position until retirement. (118:2-4).

At the time of trial, Patrick was working at Midwest Floor Coverings. (119:20-22). He had been employed there approximately two years. (185:24-25). Patrick testified that he made $42,000 per year. (168:12-14; 190:17-20). He also has rental income of approximately $1100 per month. (230:20-25). He received dividends from the gas stock. (231:1-3). He works on part-time jobs from time to time. (231:12-232:3). Patrick has a bachelor's degree in business with accounting emphasis. (186:12-16).

Joni was a stay-at-home mom for seven or eight years after their first child was born. (102:20-103:2). Thereafter, she obtained a part-time job at Target in their Human Resources Department for approximately seven years. (103:2; 105:4-11). She then obtained a job at Coldwater Creek, a retail clothing store, where she worked part-time for approximately three years. (105:14-22). She then obtained employment at the elementary school where her children had attended until the school consolidated with Fremont and she obtained her current position. (105:23-106:9). She gave up a career as a legal secretary in order to be a stay-at-home mom. (103:3-4). She testified that she would need to obtain retraining to get a better paying job. (103:5-16).

The marital home was sold after the parties separated. (35:1-6). The proceeds were used to pay for the house Joni lived in at the time of trial. (35:21-36:10). Joni purchased the house based upon representations by Patrick that she would be getting $850,000 in investments that and the interest on that money would enable her to pay the expenses of the home. (35:21-36:23; 103-7-8). Patrick did not contest Joni's testimony about his representations that she would be able to afford her new house and the associated expenses.

Michael L. Wicker testified that he has known Patrick as a real estate broker agent for Woodcliff for more than 20 years and Patrick had assisted him in three real estate transactions over the years. (14:17-16:1; 22:3-23:5). Mr. Wicker's wife, Trudy Wicker, testified that Patrick's assistance to them occurred from approximately 1990 to 2005. (27:3-20). She affirmed that Patrick was the main realtor at Woodcliff during the time they lived there. (27:21-28:3). Mr. and Mrs. Wicker estimated that Patrick sold at least ten to twenty properties at Woodcliff a year. (16:10-17; 28:10-18). They testified that Joni would help with selling properties in ways such as talking about the properties, staging, brochures, and scheduling viewings. (16:18-17:8; 28:19-29:6). Joni testified that Patrick was a broker agent and sold many homes at Woodcliff; 15 to 20 during the 1990s and tapering off in the early 2000's until he stopped selling in approximately 2009. (41:23-42:22; 190:6-7). Patrick also testified that he was the primary broker for sales at Woodcliff after obtaining his broker's license in 1987. (158:3-10; 187:21-188:17). Joni assisted him by making up brochures, running errands, secretarial work, scheduling, and other ways; she was very involved. (42:6; 46:4-17; E34). Joni was not paid for this work. (119:6-8). Joni estimated that Patrick earned anywhere from $150,000 to $200,000 per year during the years he was actively working as a real estate broker and realtor. (100:11-101:10). One year he made well over $250,000. (101:11-14). Joni's statements about Patrick's income from real estate commissions was uncontested by Patrick. The difference between the amounts Joni knew Patrick to have made and the amounts reported on their income tax returns resulted in her not signing the joint tax returns for those years. (101:15-102:4). Patrick deposited the money earned from his work as a realtor and broker into the parties' joint accounts. (102:5-16). Patrick also did work for Woodcliff II which was in charge of road grading, lake maintenance and management, security, and developing of lots for which he was paid. (189:5-24). Patrick had initially received lots at Woodcliff from his father which Patrick and/or his father and brother then sold with Patrick's proceeds going into an account. (136:13-140:22; E32, E28). Patrick was not able to show any values for lot sales or documentation as to any gifted lots. (162:24-164:17). The trial court determined that the accounts into which money from lot sales and commissions were deposited were marital assets. (T44-48).

Patrick was ordered to pay the debt owed on the John Deere Tractor and a bill for attorney fees relating to prior advice in the amount of $1,247.00 by agreement and stipulation. (164:18-165:1; 167:10-19; T50, E15). The court made no findings or award to Joni regarding attorney fees for this action as requested.

Patrick took money out of the joint checking account at First State Bank in the amount of $3,850 to pay his attorney. (54:15-19; 64:13-20; E19). Both parties put their pay into the account and used the account to pay marital bills and make purchases until the parties each put money from the account into their own separate accounts in December 2017. (61:13-62:18; E19).

Joni requested that Patrick be responsible for her attorney fees in the amount of $15,727.74. (E20). She testified that Patrick had not answered discovery in a timely and complete manner forcing her to incur additional attorney fees and had to hunt down documents that had been requested. (114:16-116:2; T16-62).

Joni filed a Motion for New Trial which was denied. (T52, 60).

Appellant appeals.

SUMMARY OF ARGUMENT

The Decree of Dissolution of Marriage did not equitably divide the assets of the parties. The trial court awarded one-third of the marital assets to Joni and two-thirds to Patrick. The trial court found that the value of lots inherited by Patrick could not be determined based upon the evidence presented and that all funds therefrom had become co-mingled and thus marital property. Nevertheless, the trial court awarded Patrick a greater share of the marital assets based upon his receipt of lots from his father, said share awarded to him amounting to an additional $872,194.30. The trial court failed to recognize Joni's contribution to maintaining and increasing the marital property. The trial court inflated Patrick's contribution to maintaining and increasing the marital property by finding that he had become a real estate agent/broker in order to sell lots gifted to him when he had in fact become a broker prior and used his licenses to sell other property as well. The trial court did not consider that Patrick had taken $650,000 out of a co-mingled account claiming it was proceeds from gifts from his father and purchased gas stock with that money, which stock had become virtually worthless at the time of trial. The trial court should have divided the marital assets 50-50.

The trial court incorrectly included the value of the Apartment at $170,000 rather than $175,000 as testified to by both parties. The trial court incorrectly included the value of Joni's NSEA retirement account at $22,557.72 rather than $20,557.72. The trial court did not consider and thus divide marital funds used by Patrick to pay premiums on a life insurance which he cashed in and retained the money.

In dividing the marital assets, the trial court gave 88% of the largest income-producing asset to Patrick, thereby depriving Joni of the opportunity to benefit equally regarding future earnings from the marital property.

Due to the multiple errors in calculating the value of marital assets, the omission of the life insurance premiums, and the award of major income-producing assets to Patrick, the division of the marital assets was inequitable and should be first corrected to include the correct values and all assets, then divided equally between the parties.

Joni should have been awarded alimony. The parties had a long-term marriage. Joni interrupted her employment to be a stay-at-home mother. She contributed to and support Patrick's career as a real estate agent/broker. She was awarded less income-producing property than Patrick to support her in the future. Patrick had a larger employment income, as well as income from other sources. Joni had purchased a house based upon representations from Patrick that she would receive sufficient marital assets to support its maintenance and expenses, but the majority of those income-producing assets were awarded to Patrick.

Patrick should have been ordered to pay Joni's attorney fees. He took money from a marital account to pay his attorney. He was in a better financial position to pay fees. Patrick's failure to timely and adequately respond to discovery resulted in Joni having to incur additional attorney fees for motions and a show cause action to compel him to respond.

ARGUMENT

ARGUMENT 1:

THE MARITAL ESTATE WAS NOT DIVIDED EQUITABLY BETWEEN THE PARTIES.

Neb. Rev. Stat. § 42-365 (Reissue 2016) provides as follows:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and other criteria enumerated in this section make it appropriate.

Under **Neb. Rev. Stat. § 42-365** (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Westwood v. Darnell*, 299 Neb. 612, 909 N.W.2d 645 (2018).

Under Nebraska's divorce statutes, the purpose of a property division is to distribute the marital assets equitably between the parties. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017). See also *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251, (2017)

The trial court awarded one-third of the marital estate to Joni and two-thirds to Patrick, a difference of $872,194.30. In making its award, the trial court stated "The court must recognize that a significant portion of the assets of the marriage are attributable to the gifts made from John Poehling to Patrick Poehling during the marriage. Patrick not only invested these gifts into the marriage, but became a real estate agent/broker to sell the deeded property and generate additional income. Equity requires that the marital estate be divided to award Patrick two-thirds and Joni one-third." (T48-29).

The trial court's analysis is faulty in several respects. The evidence established that Patrick had become a real estate agent/broker prior to the marriage of the parties. He obtained his broker's license in 1987; the parties were married in 1989. He used his licenses to sell not only the lots that were gifts to him from his father, but to sell other property and support his family during most of the marriage.

The trial court determined that Patrick did not meet his burden of proof to support his claim that lots received from his father and commissions from their sale were non-marital property. All funds had been co-mingled throughout the marriage to the point that any separate amounts attributable to Patrick could not be determined. The trial court found "The Court does not have any documentation regarding the sale of each lot to determine how much was actually received as the 1/3 inheritance. Even if the evidence was presented that showed how much of each sale was commission versus inheritance, the court still cannot be certain that in each and every transaction Patrick did not put his commissions with the 1/3 interest into the Wells Fargo account, thus co-mingling the property from the very beginning. Further, there are no statements or evidence showing the distributions of the sales to Patrick, no statements of deposit to a Wells Fargo account, and no statements of transfers from Wells Fargo to an Ameritrade account." (T45-46). The trial court first finds that it is impossible to say how much is attributable to Patrick from any gifts from his father, then awards him an additional $872,194.30 of the marital estate to compensate him for the gifts. While both parties made an effort to establish the value of lots received by Patrick, neither was as great as $872,194.30 and neither was accepted by the trial court. The consideration given to Patrick in this respect is simply not supported by the evidence or fair and equitable.

The trial court awarded Patrick the gas stock as part of his non-marital estate. Patrick testified that he had purchased the stock for $650,000 from proceeds of gifts from his father. However, the money used to make the purchase was taken from an account that the trial court had determined was co-mingled funds without Joni's consent or knowledge. This transfer itself should offset any consideration for gifts made to Patrick by his family in dividing the marital estate.

The trial court also failed to recognize Joni's contributions to the maintenance and increase of all co-mingled funds. She actively contributed to the sale of property by Patrick, without being paid, to the success of the Woodcliff sales. She contributed time, effort, and expertise to support Patrick in making the sales that were then placed in the joint accounts and used to support the couple and their family.

The trial court utilized the Ameritrade Account #920048474 to equalize the division of the marital assets, awarding 12% of the account to Joni, and 88% to Patrick. Because this was the largest investment account of the parties, the division made by the trial court awarded the vast majority of the account's earning potential to Patrick without any comparable award being made to Joni. This is a factor both in the division of property and the awarded of alimony discussed hereinafter.

The trial court valued the Apartment at $170,000 awarded to Patrick even though both parties clearly valued it at $175,000 in their testimonies. Also, the trial court valued the NSEA account awarded to Joni at $22,557.72 rather than $20,557.72 as the evidence showed, even after counsel for Patrick clarified the correct amount to the trial court.

The trial court failed to consider the life insurance that Patrick received. The evidence established that during the marriage the parties had paid at least $44,000 in premiums on life insurance for which Patrick and his brother were beneficiaries. Patrick cashed the life insurance in and received $73,193.82. Joni should have been awarded $22,000 as her half of the contributions to the life insurance policy. No decision was made by the trial court.

Due to the multiple errors in calculating the division of the marital estate, Joni did not receive a fair and equitable portion of the assets. Adjustments should be made for the life insurance premiums that were omitted and the mistaken values on the Apartment and NSEA account. Joni should be awarded one-half of the marital estate based upon the findings of the trial court that the assets had been co-mingled throughout their long marriage and could not be attributed to either party separately. Joni should also be awarded one-half based upon her contributions to the marriage and her Patrick in maintaining and growing the assets of the parties.

ARGUMENT 2:

APPELLANT SHOULD HAVE BEEN AWARDED ALIMONY.

Neb. Rev. Stat. § 42-365 (Reissue 2016) provides that when a dissolution of marriage is decreed, the court may order payment of such alimony to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interest of any minor children in the custody of such party.

> "In considering the specific statutory criteria concerning an award of alimony, a court's polestar must be fairness and reasonableness as determined by the facts of each case. *Bauerle v. Bauerle*, 293 Neb. 881, 644 N.W.2d 128 (2002). A court is also to consider the income and earning capacity of each party, as well as the general equities of each situation. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004)."

Klimek v. Klimek, 18 Neb.App. 82, 775 N.W.2d (2009).

Brozek v. Brozek, 292 Neb. 681, 874 N.W.2d 17 (2016)n considering alimony, a court should weigh four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the party seeking support to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. In addition to the specific criteria listed in § 42-365, a court should consider the income and earning capacity of each party and the general equities.

The statutory criteria for dividing property and awarding alimony overlap, but the two serve different purposes and courts should consider them separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in § 42-365 make it appropriate. *Brozek, supra.*

The evidence presented at trial showed that the parties had been married for 27 years at the time of their separation. Joni was 55 years old at the time of trial. She had graduated from high school and had about three years of college. She worked as a legal secretary when the parties married, but she left that job and was a stay-at-home mom for seven or eight years after the birth of their first child. Thereafter, she worked only part-time until two years before trial when she obtained her current position as a senior office associate at the Fremont Middle School. She earns $16.03 per hour, 40 hours per week. In 2018, she earned $33,478. She would like to retrain for a better paying job but does not feel that she would be able without financial help.

Patrick worked as a real estate agent/broker until approximately 2009, earning an estimated $150,000 to $200,000 per year. Patrick did not contest Joni's testimony that Patrick earned much more income from the real estate commissions than the gifted lots from his father. His exact earnings during this period is subject to question given some of the deductions he took on his income tax returns to the extent that Joni did not sign some of the returns due to her concern about their accuracy. Patrick has a bachelor's degree in business with accounting emphasis. At the time of trial, Patrick worked at Midwest Floor coverings earning $42,000 per year. He had rental income from marital property of approximately $1100 per month. He received dividends from the gas stock he purchased. He also worked part-time. In the event that the division of marital property awarded by the trial court should stand, he has $872,194.30 more marital assets that Joni, most of which are income earning.

In denying Joni's request for alimony, the trial court held "In the instant case, the circumstances of the parties do not warrant an award of alimony. Joni has a $350,000 home that is paid for. She has a vehicle and no debts. Joni is gainfully employed with Fremont [sic] Public Schools. She has insurance and retirement through her employer. The evidence establishes that she is capable of sustaining herself through her own employment. The parties no longer have minor children to consider regarding employment obligations. Patrick works for

Midwest Floor Covering. For the last several years, the parties are making comparable incomes." (T50).

In considering alimony, the trial court erred in recognizing Joni's contributions to the marriage:

Duration of the marriage: 27 years

History of the contributions to the marriage by each party: Joni interrupted her career as a legal secretary to be a stay-at-home mom for seven or eight year. Thereafter, by agreement of the parties, she was employed at part-time jobs, leaving her free to continue to run the household and care for the children. She only started working full-time two years ago. During the marriage, she supported Patrick's career by helping him with brochures, staging, scheduling, and office work. Her compensation was in the form of contributions to IRAs which became marital property.

Interruption of personal careers or educational opportunities: Joni interrupted her career to focus on caring for the family. She has not completed her college degree. She testified that she would need to have retraining to get a better paying job.

Joni purchased the house that she was awarded based upon the assurances she received from Patrick that she would be able to maintain the home because she would have sufficient assets from the division of property to pay for the expenses through the interest on those investments. Patrick did not provide any evidence to the contrary. In the division of property, 88% of the largest income producing asset was awarded to Patrick, leaving Joni without the income to maintain the home without liquidating other assets.

Patrick makes substantially more than Joni both in his employment and through his income-producing assets. Patrick also received an inheritance from his father of $200,00.00 in cash and one half interest in the Community Center. He is well able to pay alimony. The matter should be remanded to determine an appropriate amount of alimony.

ARGUMENT 3:

APPELLEE SHOULD BE ORDERED TO PAY APPELLANT'S ATTORNEY FEES.

"A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases." *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). "The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case." *Connolly v. Connolly*, 299 Neb. 103, 907 N.W.2d 693 (2018); see also *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

In *Gress*, the order requiring the husband to pay a portion of the wife's attorney fees was affirmed. The appellate court noted that the husband had been awarded the only income-producing marital property and reasoned that his income capacity will be substantial compared to that of the wife for some time to come. Similar reasoning was used in ordering the husband to pay the wife's attorney fees in *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

In the event that the division of assets is not overturned, Patrick will have a substantially greater amount of income producing property than Joni from marital assets. He also has a substantial amount of non-marital assets as well as the inheritance from his father. This should be a significant consideration in reversing the trial court's failure to award attorney fees. Patrick is well-able to pay Joni's attorney fees.

In addition, Patrick took money from a marital account to pay at least a portion of the attorney fees he incurred. Patrick created unnecessary attorney fees for Joni by failing to promptly and adequately answer discovery necessitating a motion to compel and the filing of contempt proceedings.

The equities of the case and the circumstances of the parties support the award of attorney fees to Joni.

Respectfully submitted,

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Certificate of Service

I hereby certify that on Tuesday, March 03, 2020 I provided a true and correct copy of this *Brief of Appellant Poehling* to the following:

Patrick Poehling represented by Bradley D Holtorf (15413) service method: Electronic Service to **holtorfb@sidnerlaw.com**

Signature: /s/ Fornoff,Leta,F, (20276)